"fee," and "perquisite." In *Windmiller* v. *People* (1898), 78 Ill. App. 273, it was held that salary means reward or recompense and does not include money paid to others as expenses. See also *Houser* v. *Orangeburg County* (1900), 59 S. C. 265, 37 S. E. Rep. 831; *Hall* v. *Hamilton* (1874), 74 Ill. 437. In *Commonwealth* v. *Bailey* (1881), 3 Ky. Law Rep. 110, 114, it was held that fees are rewards to be paid by individuals to public officers for their own or for public use. Salaries are rewards paid to public officers out of public funds for such service. See also *Steiner* v. *Sullivan* (1898), 74 Minn. 498. In *State* v. *Atherton* (1886), 19 Nev. 332, 10 Pac. Rep. 901, it was held that necessary expenses actually paid by judges for traveling by public conveyance in going to and from the place of holding court are not fees or perquisites of office. Although no direct adjudication on the constitutionality of the Michigan statute is obtainable, it would seem that the situation in Florida, taken together with the meaning of "salary," "fee" or "perquisite" as found in the decisions, would establish the constitutionality of the statute, and in view of the further provisions in § 11 of Article VI of the Constitution of Michigan, that circuit judges "may hold court for each other, and shall do so when required by law," it may be said that at least in so far as it refers to expenses incurred outside the circuit, when required by the governor to go on official duty in other circuits, there should be no question as to its validity.

F. B. D.

WHAT CONSTITUTES A WAIVER BY IMPLICATION OF THE PRIVILEGE OF CONFIDENTIAL COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.—"The rule is clear and well settled, that the confidential counsellor, solicitor or attorney of the party, cannot be compelled to disclose papers delivered or communications made to him or letters or entries made by him in that capacity." GREENLEAF, EVIDENCE, Vol. I, pp. 373, 374 (16th Ed.); *Bobo* v. *Bryson*, 21 Ark. 387; *Foster* v. *Hall*, 12 Pick. (Mass.) 89. Scarcely less elementary is the broad basis of public policy upon which the privilege rests, for if such communications were not protected, no man would dare to consult a professional adviser with a view to his defence or to the enforcement of his rights; and no man could safely come into a court either to obtain redress or to defend himself. LORD CHANCELLOR BROUGHAM *in Greenough* v. *Gaskell*, 1 My. & K. 101. The reason of the privilege makes it clear that the privilege is that of the client and not of the attorney, and such is today undisputed law, although under the original theory of the privilege it was the attorney's and not the client's. WIGMORE, EVIDENCE, Vol. IV, § 2321; *Chirac* v. *Reinicker*, 11 Wheat. 294; *Lorimer* v. *Lorimer*, 124 Mich. 631; *Tate* v. *Tate*, 75 Va. 522; *State* v. *Tall*, 43 Minn. 273. It would seem, therefore, that the client alone or his attorney on his behalf, and not a third person, although a party to the cause, could object to the introduction of testimony involving privileged communications. WIGMORE, EVIDENCE, Vol. IV, § 2321. But the contrary is maintained by the court in the case of *Bacon* v. *Frisbie*, 80 N. Y. 394, in the following language: "And had Ratnour (client) not been a party to the action and so have no right to be at the trial and object, yet the objec-

tion would lie in the mouth of Frisbie, who by it would but call upon the court to keep untouched a rule of public policy, made and to be kept not for his good but for that of all men." Be that as it may it is undisputed that the rule of privilege is for the protection of the client only and that he and he alone can waive the privilege. WIGMORE, EVIDENCE, Vol. IV, § 2327; *Rowland* v. *Plummer,* 50 Ala. 182; *Tate* v. *Tate,* 75 Va. 522; *Lorimer* v. *Lorimer,* 124 Mich. 631; *Riddles* v. *Aiken,* 29 Mo. 453; *Hunt* v. *Blackburn,* 128 U. S. 464; *Blackburn* v. *Crawfords,* 3 Wall. 175. But the heirs, devisees or personal representatives of the client are so far regarded as standing in his place that they may waive the privilege of communications between the deceased client and his attorney. *Fossler* v. *Schriber,* 38 Ill. 172; *Winters* v. *Winters,* 102 Ia. 53. And where the privilege belongs to several clients in reference to the same communication, it was held by Chancellor Walworth in the leading case of *Bank of Utica* v. *Mersereau,* 3 Barb. Ch. (N. Y.) 528, that no one of them or even a majority, contrary to the expressed will of the others, could waive the privilege so as legally to justify the attorney in giving testimony in relation to such privileged communication. In accord, *Michael* v. *Foil,* 100 N. C. 178.

The client, moreover, can waive the privilege either expressly or by implication. WIGMORE, EVIDENCE, Vol. IV, § 2327; *Koeber* v. *Somers,* 108 Wis. 497; *Blackburn* v. *Crawfords,* 3 Wall. 175. But it is generally recognized that a waiver by implication should be plain and unequivocal. "An intention to release the privilege ought to be expressed, or if implied, the implication ought to be plain." *Cahoon* v. *The Commonwealth,* 21 Gratt. (Va.) 822; *State* v. *James,* 34 S. C. 49. No difficulty arises in the consideration of what constitutes an express waiver by the client, but there is much uncertainty and conflict concerning waiver by implication. Mr. Wigmore in his work on Evidence (Vol. IV, § 2327) sums up the situation in these words: "What constitutes a waiver by implication? Judicial decisions give no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i. e., not only the element of implied intention but also the element of fairness and consistency." Although perhaps the decisions on this point cannot all be reconciled a brief survey of a few differentiated cases may not be without value.

In England the rule seems to be that a party does not lose the right to withhold privileged documents by referring to the same in his pleadings. *Roberts* v. *Oppenheim,* 26 Ch. D. 724. In *Belsham* v. *Perceval,* 10 Jur. 772, it was held by Sir James Wigram that when a defendant set out part of a privileged document in his answer and referred to the remainder he lost the benefit of the privilege as to the part set out but not as to the remainder. The rule laid down in *Hunt* v. *Blackburn,* 128 U. S. 464, generally regarded as embodying the American holding on this particular aspect of waivers, seems, although somewhat obliquely, to be opposed to the English doctrine. CHIEF JUSTICE FULLER in delivering the opinion of the court in that case, said, "But the privilege is that of the client alone; no rule prohibits the latter from divulging his own secrets, and if the client has voluntarily waived the privilege it cannot be insisted upon to close the mouth of the attorney.

When Mrs. Blackburn entered upon *a line of defence* which involved what transpired between herself and Weatherford (attorney) and respecting which she testified, she waived her right to object to his giving his own account of the matter * * * ." It is also held in England that where there are a number of privileged documents involved, a waiver in respect to some of them does not preclude the party from claiming the privilege as to the remainder. *Lyell* v. *Kennedy,* 27 Ch. D. 1.

But the most difficult and oft met questions in relation to waiver by implication cluster around two main sets of facts, first, where the client himself takes the stand and, second, where the client calls his attorney as a witness in his behalf.

On the question whether a client in a criminal case, who turns state's evidence and goes on the stand to convict others by testimony which also convicts himself, waives the privilege of communications to and from his attorney, the cases are in conflict. The court in *Jones* v. *State,* 65 Miss. 179, and in *Alderman* v. *People,* 4 Mich. 414, held that there was such a waiver implied, on the theory that to preserve the privilege in such a case would be worse than vain, for while it could not help the witness, it might by withholding one, perhaps the only means, of impeaching him, work injustice toward the party on trial. But the contrary is maintained in able decisions in *Sutton* v. *State,* 16 Tex. App. 490; *State* v. *James,* 34 S. C. 49.

Where the client in the ordinary civil or criminal case takes the stand to testify in general in the cause, it would seem that he does not thereby waive the privilege of communications with his attorney, and the adversary ought not to be allowed to force such communications from him on cross-examination. By taking the stand it may be implied that he is ready to testify to all the facts within his knowledge touching the issues, but are confidential communications within the range of such facts? To hold in the affirmative would create the situation described by Mr. Wigmore in his work on EVIDENCE, Vol. IV, p. 3253, "the privilege would be exercised only at the penalty of closing the client's own mouth on the stand." The clear weight of authority seems to be, that a client does not waive the privilege by testifying in general in the cause. *Hemenway* v. *Smith,* 28 Vt. 701; *Duttenhofer* v. *The State,* 34 Oh. St. 91 (a criminal case), but see *King* v. *Barrett,* seq.; *Bigler* v. *Reyher,* 43 Ind. 112; *Oliver* v. *Pate,* 43 Ind. 132; *Barker* v. *Kuhn,* 38 Ia. 392; *State* v. *White,* 19 Kas. 445; *Wilkins* v. *Moore,* 20 Kan. 538; *McCooe* v. *Dighton,* 173 Mass. 117; *Herring* v. *State* (Texas), 42 S. W. 301. But in Ohio it was held that under their Code of Civil Procedure, if the client take the stand as a witness generally in his own behalf, he waives the privilege, *King* v. *Barrett,* 11 Oh. St. 261; and in an early Massachusetts' case, JUDGE AMES in rendering the opinion of the court said: "The objection that the defendant was wrongfully compelled to undergo a cross-examination as to what he said to his counsel cannot be sustained. The policy of the law will not allow the counsel himself to make disclosures of confidential communications from his client, but if his client sees fit to be a witness he makes himself liable to full cross-examination like any other witness" (p. 200). *Woburn* v. *Henshaw,* 101 Mass. 193.

But it is equally clear that if the client takes the stand in his own behalf and testifies as to certain communications to his attorney, he waives the priv-

ilege and the adversary is at liberty both to cross-examine the client in regard to such communications and also to call the attorney to the stand and examine him as to the same communications for the purpose of contradicting the client or otherwise discrediting the client's testimony. It would not subserve public policy to allow a client to use the privilege both as a sword and as a shield, to disclose as much of the privileged communications as suited his case and to withhold the remainder, and in addition, to have his voluntary disclosures exempted from the test of cross-examination. And to such effect are the authorities. WIGMORE, EVIDENCE, Vol. IV, § 2327; *Takamori* v. *Kanai,* 11 Hawaiian 1; *Louisville* v. *Nashville R. R.* v. *Hill,* 115 Ala. 334; *Hartford Fire Ins. Co.* v. *Reynolds,* 36 Mich. 502; *Young* v. *State,* 65 Ga. 525; *Eldridge* v. *State,* 126 Ala. 63; *Oliver* v. *Pate,* 43 Ind. 132; *Wilkins* v. *Moore,* 20 Kan. 538; *Tate* v. *Tate,* 75 Va. 522.

When the client calls his attorney as a witness in his own behalf, the question of how far such proceeding is a waiver by implication of the privilege, is apparently determined by the same considerations as in the case where the client himself takes the stand. The law on this point is well summarized in the early case of *Vaillant* v. *Dodemead,* 2 Atkyn's Rep. 524 (1742). The suit involved a bill to be relieved against a collusive assignment of a lease; the defendant having examined Mr. Bristow, his clerk in court, the plaintiff exhibited interrogatories for cross-examination, which were demurred to on the ground that the witness knew nothing of the matters inquired of, except what had come to his knowledge as the defendant's clerk. The Lord Chancellor in overruling the demurrer said, "That this is a cross-examination and whenever at law, the party calls upon his own attorney for a witness, the other side may cross-examine, but that must be relative to the same matter and not as to other points in the cause." If the client call his attorney as a witness in general to testify to facts which came to his knowledge otherwise than through confidential communications, he does not by implication waive the privilege of such communications. WIGMORE, EVIDENCE, Vol. IV, p. 3253, § 2327; *Landsberger* v. *Gorham,* 5 Calif. 450; *Montgomery* v. *Pickering,* 116 Mass. 227; *Blount* v. *Kimpton,* 155 Mass. 378. But if the client introduces testimony of his attorney regarding or involving privileged communications, then he impliedly waives the right to secrecy and the adversary can cross-examine as to such privileged communications as touch and concern the issues involved in the cause and developed on direct examination, but not as to other privileged communications. *Vaillant* v. *Dodemead,* 2 Atkyn's Rep. 524; *Takamori* v. *Kanai,* 11 Hawaiian Rep. 1; *Tate* v. *Tate,* 75 Va. 522.

Although different courts may reach dissimilar conclusions as to what constitutes an implied waiver of privileged communications to or by an attorney, under nearly identical sets of facts, yet they all seem to agree on the test to be applied, viz., that the client must be consistent and fair. If he wishes to avail himself of the privilege he must not attempt to benefit his case by introducing such communications in his own behalf; if he calls upon the attorney to disclose a portion of such communications in his interest, the adversary has then a right to draw out from the attorney or from the client (if he takes the stand) the entire communication and to test it by cross-examination.

H. S.